



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

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Application of Pacific Gas and Electric  
Company for Recovery of Recorded  
Expenditures Related to Wildfire Mitigation  
and Catastrophic Events, as well as Other  
Recorded Costs (U 39 M)

Application 20-09-019

**APPLICATION FOR REHEARING OF COMMISSION DECISION D.23-02-017 BY  
THOMAS DEL MONTE**

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Dated: March 10, 2023

## Table of Contents

|             |   |           |
|-------------|---|-----------|
| <b>I.</b>   | <b>INTRODUCTION.....</b>  | <b>1</b>  |
| <b>II.</b>  | <b>STANDARD OF REVIEW FOR REVERSING COMMISSION ERROR .....</b>  | <b>2</b>  |
| <b>III.</b> | <b>BACKGROUND FROM I.19-06-015 WILDFIRE OII.....</b>  | <b>2</b>  |
| <b>IV.</b>  | <b>DISCUSSION .....</b>   | <b>4</b>  |
| A.          | WHETHER PG&E EQUIPMENT IGNITED THE TUBBS FIRE IS A MATERIAL FACT ON WHICH THE COMMISSION MUST MAKE A FINDING BEFORE ALLOWING RECOVERY OF PG&E'S REQUESTED TUBBS FIRE CEMA COSTS.....  | 4         |
| B.          | SCOPING OUT FROM THIS PROCEEDING A FINDING ABOUT THE CAUSE OF THE TUBBS FIRE PRECLUDED THE COMMISSION FROM COMPLYING WITH THE STATUTORILY REQUIRED JUST AND REASONABLE INQUIRY. ....  | 5         |
| C.          | THE <i>FINAL DECISION</i> IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT IT RELIES ON CONTESTED UNSUPPORTED HEARSAY TO ESTABLISH A MATERIAL FACT NECESSARY FOR IT TO AWARD RECOVERY OF TUBBS FIRE CEMA COSTS. ....  | 7         |
| D.          | CONTRARY TO THE <i>FINAL DECISION</i> , DEL MONTE DOES INDEED CITE EVIDENCE IN SUPPORT OF THE CONCLUSION THAT VEGETATION WOULD HAVE AVOIDED THE TUBBS FIRE AND THAT IT IS APPROPRIATE TO ASSUME THAT THE TUBBS FIRE AND ITS RELATED CEMA COSTS WOULD HAVE BEEN AVOIDED PG&E HAD COMPLIED WITH INSPECTION AND VEGETATION CLEARANCE LAWS..... | 9         |
| E.          | THE <i>FINAL DECISION</i> IMPROPERLY SHIFTS THE BURDEN OF PROOF TO DEL MONTE AND APPLIES A "CERTAINTY" OR "NEAR CERTAINTY" STANDARD OF PROOF TO DEL MONTE TO SHIFT THE BURDEN BACK TO PG&E. ....  | 11        |
| F.          | THE COMMISSION'S TREATMENT OF CAL FIRE AND SED TUBBS FIRE REPORTS COMPARED TO DEL MONTE'S EVIDENCE VIOLATES RULE 13.6 .....   | 12        |
| G.          | THE COMMISSION'S APPROVAL OF SETTLEMENT DOES NOT MEET THE REQUIREMENTS OF RULE 12.1(D) .....  | 12        |
| H.          | DENYING DEL MONTE'S ABILITY TO PARTICIPATE ON THE ISSUE PG&E'S CAUSATION OF TUBBS FIRE VIOLATED DEL MONTE'S DUE PROCESS RIGHTS UNDER THE CALIFORNIA CONSTITUTION .....  | 15        |
| <b>V.</b>   | <b>CONCLUSION .....</b>   | <b>16</b> |

# TABLE OF AUTHORITIES

## CASES

|  |    |
|--|----|
| <i>Armstrong v. Manzo</i> (1965) 380 U.S. 545.....   | 14 |
| <i>City of Stockton v. Marina Towers LLC</i> (2009) 171 Cal.App.4th 93.....                                    | 2  |
| <i>Clean Energy Fuels Corp. v. Public Utilities Com.</i> (2014) 227 Cal.App.4th 641 .....                      | 7  |
| <i>Daniels v. Department of Motor Vehicles</i> (1983) 33 Cal.3d 532.....                                       | 7  |
| <i>Grannis v. Ordean</i> (1914) 234 U.S. 385 .....   | 14 |
| <i>Gregory v. State Bd. of Control</i> (1999) 73 Cal.App.4th 584 .....   | 7  |
| <i>Greyhound Lines, Inc. v. Pub. Utilities Comm'n</i> (1967) 65 Cal. 2d 811.....                               | 7  |
| <i>Monterey Peninsula Water Management Dist. v. Public Utilities Com.</i> (2016) 62 Cal.4th 693 .....          | 2  |
| <i>Napa Valley Wine Train, Inc. v. Public Utilities Com.</i> (1990) 50 Cal.3d 370 .....                        | 2  |
| <i>Pacific Gas &amp; Electric Co. v. Railroad Commission of California</i> (N.D.Cal.1936), 13 F.Supp. 931..... | 15 |
| <i>People v. Ramirez</i> ("Ramirez") (Cal. 1979), 599 P.2d 622 .....   | 15 |
| <i>Ryan v. California Interscholastic Fed'n-San Diego Section</i> (2001) ("Ryan") 94 Cal. App. 4th 1048.....   | 15 |
| <i>Util. Consumers' Action Network v. Pub. Utilities Com.</i> (2010) 187 Cal. App. 4th 688 .....               | 7  |
| <i>Walker v. City of San Gabriel</i> (1942) 20 Cal.2d 879 .....  | 8  |
| <i>Western Oil and Gas Assn. v. State Lands Com.</i> (1980) 105 Cal.App.3d 554.....                            | 2  |
| <i>Woodbury v. Brown-Dempsey</i> (2003) 108 Cal.App.4th 421 .....  | 2  |
| <i>Yamaha Corp. of America v. State Bd. of Equalization</i> (1998) 19 Cal.4th 1.....                           | 2  |

## RULES

|                |   |
|----------------|---|
| Rule 16.1..... | 1 |
|----------------|---|

## CONSTITUTIONAL PROVISIONS

|  |    |
|--|----|
| Cal. Const., art. I, § 7, subd. (a)..... | 14 |
|--|----|

## PUBLIC UTILITIES CODE

|                  |      |
|------------------|------|
| 1705.....        | 6    |
| 1757(a)(4) ..... | 7    |
| 1757.1 .....     | 2    |
| 451.2(a).....    | 4, 6 |
| 454.9(b) .....   | 4    |

## COMMISSION DECISIONS

|                    |    |
|--------------------|----|
| D. 12-12-030 ..... | 11 |
| D.01-02-075 .....  | 13 |
| D.12-10-019 .....  | 12 |

|                  |      |
|------------------|------|
| D.17-11-033..... | 4    |
| D.20-05-019..... | 3, 9 |
| D.20-12-015..... | 3    |
| D.21-08-024..... | 4    |
| D.22-01-006..... | 15   |
| D.90-08-068..... | 13   |

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Application 20-09-019  
(Filed September 30, 2020)

**APPLICATION FOR REHEARING OF COMMISSION DECISION D.23-02-017 BY  
THOMAS DEL MONTE**

Pursuant to Rule 16.1 of the Commission Rules of Practice and Procedure ("Rule" or "Rules"), party Thomas Del Monte ("Del Monte") respectfully files the following application for re-hearing ("AFR") for Commission Decision (D.)23-02-017 ("*Final Decision*") issued February 8, 2023 approving a contested settlement (the "Settlement Agreement"). The *Final Decision* approved \$167,913,000 in ratepayer recovery of costs recorded in a catastrophic event memorandum account ("CEMA") related to PG&E's response to the Tubbs Fire (the "Tubbs Fire CEMA costs").

**I. INTRODUCTION**

The Commission's decision to award PG&E recovery the Tubbs Fire CEMA costs, rests on (A) a determination that "the cause of the Tubbs Fire is outside the scope of this proceeding" (B) a finding that "CalFIRE has concluded that PG&E did not cause the fire and the Commission's Safety and Enforcement Division has found no violations by PG&E with respect to the fire," and (C) the ambiguous comment that that "Del Monte cites no evidence in support of the conclusion that vegetation management would have avoided<sup>1</sup> the Tubbs Fire and instead simply assumes the fire would not have spread," followed by the assertion that Del Monte did not establish that the Tubbs Fire CEMA costs would have been avoided "PG&E had done the work Del Monte claims should have been done." (*Final Decision* at pgs. 18-19). The factual and legal errors related to each of these reasons and others are discussed in detail below.

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<sup>1</sup> While the *Final Decision* does not include the words "igniting" or "causing," there is no possible meaning in the context of the record where the sentence "would have avoided the Tubbs Fire" does not mean "would have avoided igniting the Tubbs Fire."

## II. STANDARD OF REVIEW FOR REVERSING COMMISSION ERROR

Under Public Utilities Code Section 1757.1<sup>2</sup>, subdivision (a), the Commission commits legal error where: (1) the decision was an abuse of discretion; (2) the Commission has not proceeded in the manner required by law; (3) the Commission acted without or in excess of its powers or jurisdiction; (4) the decision of the Commission is not supported by the findings; (5) the order or decision was procured by fraud; or (6) the order or decision of the Commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

A court will review a decision of the Commission to determine whether the Commission "proceeded in the manner required by law." (§ 1757.1(a)(2)) A Commission decision that is contrary to the governing statute will not survive, because it necessarily means the Commission has not proceeded in the manner required by law. (*Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 383 ["The PUC's order, which is predicated on an erroneous interpretation of the statute, is contrary to law"]; see *Monterey Peninsula Water Management Dist. v. Public Utilities Com.* (2016) 62 Cal.4th 693, 699 [reversing Commission decision based in part on rejecting Commission's reading of governing statute]). The interpretation of a statute and what it requires is a question of law subject to independent judicial review. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7)

A court will also review a decision to determine whether the Commission abused its discretion. (§ 1757.1(a)(1)) "An administrative agency may abuse its discretion if it acts arbitrarily or capriciously." (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.Appg.4th 421, 438; see also *City of Stockton v. Marina Towers LLC* (2009) 171 Cal.Appg.4th 93, 114) A determination that is "not supported by a fair or substantial reason" is arbitrary and capricious. (See *Western Oil and Gas Assn. v. State Lands Com.* (1980) 105 Cal.Appg.3d 554, 565).

## III. BACKGROUND FROM I.19-06-015 WILDFIRE OII

Additional background is include here related to the treatment of PG&E's culpability in causing the Tubbs Fire in the Commission's Order Instituting Investigation I.19-06-015 (Wildfires OII) to ensure the Commission's treatment of the Tubbs Fire in I.19-06-015 will also be subject to review in relation to the current proceeding. On June 27, 2019, the Commission opened Wildfires OII regarding the role that Pacific Gas and Electric Company's (PG&E) electrical facilities had in igniting fires in its service territory in 2017, including the Tubbs Fire.

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<sup>2</sup> All references to code in these comments are to the California Public Utility Code unless otherwise stated.

Despite what it may seem, Commission decisions D.20-05-019 and D.20-12-015 argue that the cause of the Tubbs Fire was never within the scope of the investigation and that only whether PG&E committed violations of law based upon SED's pre-proceeding Tubbs Fire investigation report (which had found no violations) was within the scope of the proceeding. (See D.20-12-015 at pg. 24) Further, the Commission concludes that because the proceeding ended in settlement, the Commission did not make any findings on PG&E violations (see D.20-05-019 at pg. 62) and indeed did not create an evidentiary record necessary to make such findings. (See April 20, 2021 Del Monte Motion to Amend Scope's Attachment A: Case No. A161719. Answer of Respondent to Petition for Writ of Review (March 25, 2021) ("*Commission Answer*") for a more detailed view of the Commission's positions.)

Nevertheless, the Commission held that only the fact that SED did not find Tubbs Fire violations of law was within the proceeding scope, yet Del Monte's Tubbs Fire allegations of violations of law were outside the scope. (See D.20-12-015 at pg. 24, explaining "issues relating to the cause of the Tubbs Fire are not at issue, but the fact that SED did not pursue any violations against PG&E concerning the Tubbs Fire is within the scope of the proceeding.") In justifying its paradoxical position, the Commission argued that only SED had the right as the prosecutor to make allegations in the Wildfire OII and determine the scope. (See D. 20-12-015 at pg. 14; see also *Commission Answer* at pgs. 25-26.) All evidence in the Wildfire OII's record regarding the Tubbs Fire cause and related violations were barred from consideration in the Commission's decision. Also, Del Monte's and others timely requests to cross-examine witnesses in evidentiary hearings were denied. Therefore, Del Monte and other intervenors were not afforded the opportunity to present argument or evidence on PG&E's culpability in causing the Tubbs Fire in the Wildfire OII or elsewhere and the Commission has never made a finding as to whether PG&E caused the Tubbs Fire.

Importantly, in response to intervenors' claims that the Wildfire OII proceeding's failure to consider allegations and evidence presented in the Wildfire OII would deprive them of the ability to protect themselves from to unjust and unreasonable costs when PG&E invariably applied to recover costs associated with the Wildfire OII fire costs, including the Tubbs Fire, the Commission offered what this proceeding demonstrates were false and misleading assurances that Commission's approval the contested settlement and closing of the Wildfire OII "cannot and does not bar the Commission from undertaking the necessary reasonableness review required by law for any costs for which PG&E seeks ratepayer recovery in the future." (D.20-05-019 at pg. 63) As demonstrated in the current proceeding, it is the Commission's intention to never consider PG&E's culpability in igniting the Tubbs Fire.

#### IV. DISCUSSION

##### **A. Whether PG&E Equipment Ignited the Tubbs Fire is a Material Fact on Which The Commission Must Make a Finding Before Allowing Recovery of PG&E's Requested Tubbs Fire CEMA Costs.**

Whether PG&E imprudently caused the Tubbs Fire is a material fact that the Commission is required by statute to make a finding upon to determine whether ratepayer recovery of Tubbs Fire CEMA is consistent with the law. The choice to exclude a finding on the cause of the Tubbs Fire from this proceeding, made it impossible for the Commission to meet the required standard of review for PG&E recovery of Tubbs Fire CEMA costs. Section 454.9(b) states that CEMA costs shall be recoverable following a Commission finding of their reasonableness. Further, as part of the Commission's review of any application for recovery of 2017 catastrophic wildfire costs such as the Tubbs Fire, Section 451.2(a) requires that the Commission consider whether the costs and expenses "are just and reasonable in accordance with section 451." Section 451 requires that "all charges demanded or received by any public utility ... shall be just and reasonable." Section 451 also requires that public utilities "shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities ... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." Failure to inspect power lines on legally required intervals and managing the vegetation surrounding utilities power lines to maintain legally required clearances in violation of those inspection and safety laws (as Del Monte has alleged) is evidence of imprudent management.

As the Commission correctly ruled in D.21-08-024 denying SoCal Edison's ("SCE") request to recover CEMA expenses related to the 2017 Thomas and Rye Fires, when "there is evidence that [a utility's] equipment ignited the fires" in the record the utility must also provide in the record sufficient information for the "Commission in determining whether it acted reasonably and prudently, such as information about its maintenance activities and knowledge of fire risks in the area." (See D.21-08-024, at pg. 17.) That is, once there is evidence that a utility's equipment ignited the wildfire, the burden of proof shifts to the utility to either either refute the evidence that it ignited the fire or that despite its equipment ignited the fire, the utility was still acting prudently with its management practices.

Similarly in D.17-11-033's, the Commission denied San Diego Gas & Electric ("SDG&E") recovery of costs associated with the Witch Fire in response to uncontested and party-supported evidence that SDG&E equipment started the Witch Fire. The Commission found that because of the evidence in the record that SDG&E equipment had ignited the fire, as a matter of law, "SDG&E's operation and management of its facilities prior to the ignition of the



2007 Wildfires is subject to a reasonableness review" and that the "reasonableness review entails a review on the prudence of SDG&E's actions leading up to the ignition of the 2007 Wildfires." (See D.17-11-033 Conclusions of Law 5 and 6.) Further, D.17-11-033's Finding of Facts 5, 21, and 20 confirm and make clear that whether the utility's equipment was involved in igniting/causing the wildfire is, of course, material in determining the reasonableness of wildfire cost recovery for the offending utility. Furthermore, D.17-11-033's Findings of Facts 21, 22, and 26 make clear that whether the cause of wildfire was the result of a violation of law by a utility is material evidence of imprudent management.

These decision, the Commission's longstanding prudent manager standard,<sup>3</sup> and common sense demonstrate that whether a utility's negligence and/or imprudence caused a wildfire, is material to whether recovery of CEMA costs associated with that fire is just and reasonable under the required statutory analysis. The Commission has the explicit statutory authority under Section 315 to independently investigate the cause of all accidents occurring within California allegedly related to utility property. (See Section 315) This includes investigational authority into accidents that result in wildfires and regulatory authority to enforce violations of the Public Utilities Code. The Commission's use of CAL FIRE's Tubbs Fire Report in effect improper delegation of its authority and responsibility to CAL FIRE such that it deprives Del Monte and the public a forum to exercise the statutory protections of Section 451. Because the Commission has no lawful basis for its refusal to consider or make a finding about the material fact of whether PG&E equipment ignited the Tubbs Fire, the Commission has acted arbitrarily and not as required by law, making recovery of PG&E Tubbs Fire CEMA costs unlawful.

**B. Scoping Out from this Proceeding a Finding About the Cause of the Tubbs Fire Precluded the Commission From Complying with the Statutorily Required Just and Reasonable Inquiry.**

In Del Monte's initial protest to PG&E's Application in this proceeding, Del Monte stated that he was prepared to present expert testimony on physical evidence that demonstrated that PG&E equipment had indeed caused the Tubbs Fire due to negligence and imprudent management. Del Monte's evidence was discovered by the insurance company plaintiffs' investigator in the Tubbs Fire civil trial after the California Department of Forestry and Fire Protection ("CAL FIRE") and the Commission's Safety and Enforcement Division's ("SED") had concluded their investigations and the Commission had finalized the scope of I.19-06-015 limited in relevant part to the contents of the CAL FIRE and SED Tubbs Fire Reports. Del

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<sup>3</sup> S.B. 901 and AB 1054 specifically excluded wildfires first ignited in 2017 from the changes to the required reasonableness review standard applicable to wildfires ignited in 2018 and forward.

Monte further stated that evidence would demonstrate that PG&E equipment ignited the Tubbs Fire after vegetation clearance and related violations allowed vegetation to touch PG&E's power lines resulted in conductor arcing that ignited the Tubbs Fire. This evidence was the basis PG&E's bankruptcy court released the PG&E's Tubbs Fire civil trial from the bankruptcy stay and for PG&E settling with the Tubbs Fire victim on the eve of the civil trial.

In response to Del Monte's protest and Del Monte's efforts to have PG&E's culpability in causing the Tubbs Fire considered in the Wildfire OII, Former Commissioner Batjer (acting as the Assigned Commissioner in this proceeding) issued the December 23, 2020 Scoping Memo stating in relevant part, that the hearing would not be conducting inquiry into the root cause of the Tubbs Fire." Further, in response to Del Monte's subsequent motion to expand the scope of the proceeding to include the cause of the Tubbs Fire in this hearing the Assigned Commissioner and ALJ ruled that, "This proceeding will not make a finding regarding the cause of the Tubbs Fire." (May 21, 2021, Ruling on PGE Motion to Strike and TDM Motion to Expand Scope, at pg. 4)

The Assigned Commissioner's scoping ruling and subsequent denial of Del Monte's motion to expand the scope, not only barred inquiry into the cause of the Tubbs Fire it block consideration of a necessary element of proof to demonstrate that PG&E's Tubbs Fire costs resulted from PG&E's imprudent and negligent behavior. For example, in order for an intervening ratepayer to protect themselves from utility costs that are unlawful to recover PG&E's Tubbs Fire CEMA costs resulted from imprudent behavior and, the intervenor must establish causal linkages between 1) PG&E imprudence, 2) the cause of the Tubb Fire, and 3) the Tubbs Fire costs PG&E seeks to recover. The Assigned Commissioner's did more than simply decide the that the Commission would not make a finding on the "cause prong" of the Tubbs Fire, the Commission refused to consider the evidence of PG&E's imprudence in causing the Tubbs Fire.

This scoping decision was an abuse of discretion that denied Del Monte the statutory protections under Section 451 to not be subjected to pay unjust and unreasonable rates by making it impossible for the Commission to competently determine on all material issues whether recovery of the CEMA Tubbs Fire costs are "just and reasonable in accordance with section 451." (Section 451.2(a)) This also constitutes a violation of Del Monte's constitutional due process rights to not be subject to arbitrary proceedings, as discussed below.

While under Section 1705 the Commission is afforded certain discretion in establishing its hearing procedures, the discretion is restrained by law so that every issue that must be resolved to reach an ultimate finding that a proposed settlement is reasonable in light of the

whole record, consistent with law, and in the public interest must be treated as a material issue to Commission decision and must be resolved with findings on all material facts upon which the ultimate finding is based. (See *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal.Appg.4th 641, 662; see also *Greyhound Lines, Inc. v. Pub. Utilities Comm'n* (1967) 65 Cal. 2d 811, 813 finding "Every issue that must be resolved to reach that ultimate finding is 'material to the order or decision.' [citations omitted]") As discussed above, when the question of whether utility equipment was involvement in igniting a wildfire, the factual causation issue becomes inseparable from the question of whether utility imprudence caused the cost the utility seeks to recover. The utility does not need to admit fault in igniting the fire for the factual question of causation to be competently raised. Therefore, the Assigned Commissioner's choice to refuse to make a finding on the cause of the Tubbs Fire irreconcilably tainted the hearing and any Tubbs Fire CEMA cost recovery based on it because the Commission's because when an issue of whether the utility acted imprudently is barred from consideration without lawful basis in the hearing the hearing "fails to bear a reasonable relation to statutory purposes and language" [citations omitted]" of the required Section 451's just and reasonableness review. (See *Util. Consumers' Action Network v. Pub. Utilities Com.* (2010) 187 Cal. Appg. 4th 688, 698).

**C. The *Final Decision* is Not Supported by Substantial Evidence in that it Relies on Contested Unsupported Hearsay to Establish a Material Fact Necessary for it to Award Recovery of Tubbs Fire CEMA Costs.**

While hearsay is admissible in Commission proceedings, it is well settled law that uncorroborated hearsay evidence is insufficient alone to provide the necessary substantial evidence to support a decision to pass muster under "substantial evidence" test of Section 1757(a)(4). (See *The Util. Reform Network v. Pub. Utilities Com.* (2014) ("*TURN 2014*") 223 Cal. Appg. 4th 945, 960-62.) California courts when reviewing Commission proceedings are bound to adhere to the so-called "residuum rule," under which the substantial evidence supporting an agency's decision must consist of at least "a residuum of legally admissible evidence." (See *Id.*) As stated in *TURN 2014*, under the "residuum rule," hearsay evidence cannot be the sole support for a finding of disputed fact in a Public Utilities Commission (PUC) proceeding. (See *Id.* citing Cal. Evid. Code § 1200(a); Cal. Pub. Util. Code § 1701; Rule 13.6(a). As the court in *TURN 2014* recognizes "The admissibility and substantiality of hearsay evidence are different issues." (See *Id.* citing *Gregory v. State Bd. of Control* (1999) 73 Cal.Appg.4th 584, 597.) As the California Supreme Court has explained, "mere admissibility of evidence does not necessarily confer the status of 'sufficiency' to support a finding absent other competent evidence." (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 538, fn. 3.) "There

must be substantial evidence to support ... a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end.” (*Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881, overruled on another ground in *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 37, 44.)

In an apparent effort to side-step the unsupported hearsay prohibitions the law imposes on Commission proceedings, the presiding ALJ chose, over Del Monte's objection, to take Official Notice of the "existence and the conclusions" of the CAL FIRE and SED Tubbs Fire Reports, claiming that they would be used for "reference only" and were not to be used establish the truth of the matters asserted therein. (See June 7, 2021 Status Conference Transcript at pgs. 25-26) However, that is exactly what the *Final Decision* does. The Final Decision directly cites the CAL FIRE and SED Tubbs Fire Reports on the cause of the Tubbs Fire and related PG&E violations of law to directly refute Del Monte's factual and legal allegations that PG&E's violations of vegetation management laws caused the Tubbs Fire. (See *Final Decision* at pg. 19) Any argument that the Commission is not relying on the CAL FIRE and SED Tubbs Fire Reports for the truth of the matters asserted therein is undone by the Commission's reliance on the inferences drawn from those same materials. For the existence and conclusions of CAL FIRE and SED Tubbs Fire Reports to have any meaning at all in this proceeding, the assertions in the CAL FIRE and SED Tubbs Fire Reports must be true or appropriately settled in a fair proceeding.

Therefore, the logic integral to the *Final Decision's* outcome on this point is that even if the Commission does not accept as true CAL FIRE and SED Tubbs Fire Reports assertions, the Commission is free to rely upon those same assertions as the source for an inference of fact that PG&E imprudence did not cause the Tubbs Fire in order to satisfy its statutory duty to make findings on all material disputed facts and issues. This approach would have the Commission adopt a novel but unsupportable approach to handling unsupported and contested hearsay evidence. If the evidence in question cannot be relied upon to establish the truth of the matters asserted, it also cannot be relied upon to establish the truth of a matter *suggested* by that hearsay evidence and surely cannot be relied upon to deny a party the opportunity to refute such hearsay evidence with contradictory non-hearsay evidence competently presented. After all, the inference "that PG&E did not cause the fire" from the CAL FIRE Tubbs Fire Report is only true or reliable to the extent the related statements contained in CAL FIRE Tubbs Fire Report are true. Similarly, the inference in the SED Tubbs Fire Report that "PG&E did not violate vegetation management laws and rules related to the Tubbs Fire" is only true or sufficiently reliable to the extent that it is true.

Perhaps more importantly, SED's position on the Tubbs Fire is that SED fully relied on CAL FIRE to make the determination as to whether the utility equipment ignited the fire making it impossible for SED to find any violations of law related to the imprudent lack of inspections and vegetation management resulting causation of the Tubbs Fire, leaving SED limited to only consider possible violations of PG&E recordkeeping and administrative reporting rules. (See D.20-05-019 at pgs. 60-61) This makes the SED Tubbs Fire Report and its investigation into related violations, irrelevant to statutorily required standard of review necessary in this proceeding for the Commission to award the requested Tubbs Fire CEMA costs and, therefore, must fail as a basis to supply the Commission the substantial evidence support that PG&E's Tubbs Fire CEMA costs were the result of prudent management or that recovery of the Tubbs Fire CEMA costs is just and reasonable under Section 451.

**D. Contrary to the *Final Decision*, Del Monte Does Indeed Cite Evidence in Support of the Conclusion that Vegetation Would have Avoided the Tubbs Fire and that It is Appropriate to Assume that the Tubbs Fire and its Related CEMA Costs Would Have Been Avoided PG&E had Complied with Inspection and Vegetation Clearance Laws.**

The *Final Decision* confusingly states that "Del Monte cites no evidence in support of the conclusion that vegetation management would have avoided the Tubbs Fire and instead simply assumes the fire would not have spread." As an initial matter, the Final Decisions' critique about Del Monte's assumption that the Tubbs Fire would not have spread is ambiguous in its meaning. It is not in dispute that the Tubbs Fire ignited and then spread, in fact it is undisputable. Also, to be clear, Del Monte never made any arguments nor presented any evidence about whether or not the Tubbs Fire would have *spread* if PG&E had done its legally required vegetation management, only that Tubbs Fire would have never started in the first place but for PG&E's imprudence and negligence related to its inspection and vegetation clearance obligations. Therefore, it appears that the only rational interpretation this *Final Decision* sentence could instead be rewritten as "Del Monte cites not evidence in support of the conclusion that vegetation management would have avoided igniting the Tubbs Fire and instead simply assumes that the fire would not have ignited but for imprudent vegetation management." That is, the Commission's assertion boils down to the arbitrary claim that Del Monte did not *cite* to evidence for his claims to prove an issue that the Commission deems outside the scope of the proceeding.

To clarify, Del Monte's position which is supported in the record and by the relevant procedural laws governing recovery of rates is the following:

1. Vegetation contacted PG&E powerlines and caused an arching that ignited the Tubbs Fire. (See Exhibit TDM-01 *Direct Testimony of Kenneth Buske*.)
2. Due to a mapping error, for *four* years PG&E had failed to perform the required inspections and *any* vegetation related to ensuring safe clearances of the powerline and in area identified in investigator Kenneth Buske's testimony as the ignition source and origin area of the Tubbs Fire. (See Exhibit TDM-02 *Direct Testimony of Thomas Del Monte* at pg. 21, q. 10, also pgs. 8.)
3. Given Del Monte's uncontested factual assertions, PG&E has violated Government Order 95 Rules 31.2 which requires that its powerlines must be "inspected frequently and thoroughly for the purpose of insuring that they are in good condition so as to conform with these [safety] rules." (See e.g. Exhibit TDM-02 *Direct Testimony of Thomas Del Monte* at pg. 31.)
4. Given Del Monte's uncontested factual assertions, PG&E has violated Government Order 95 Rule 31.1 in that it failed to meet the requirement that its power lines "shall be maintained in a condition which will enable the furnishing of safe, proper and adequate service." (See e.g. Exhibit TDM-02 *Direct Testimony of Thomas Del Monte* at pg. 28.)
5. Given Del Monte's uncontested factual assertions, PG&E has violated Section 451's requirement that PG&E "shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities ... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."
6. Given Del Monte's uncontested factual assertions, PG&E has also violated Public Resources Code Section 4293 because PG&E is required to maintain radial vegetation clearance at a distance that "shall be sufficiently great to furnish the required clearance at any position of the wire, or conductor when the adjacent air temperature is 120 degrees Fahrenheit, or less." (See Exhibit TDM-01 *Direct Testimony of Kenneth Buske* demonstrating that vegetation touched the powerline thereby convulsively demonstrating that the required 10' radial clearance was not maintained; see CAL FIRE Tubbs Fire Report at pg. 3, stating that the ambient temperature in the origin area was in the 60's to lower 70's; see also Exhibit TDM-02 *Direct Testimony of Thomas Del Monte* at pg. 28.)

When evidence is presented that demonstrates that vegetation did indeed contact powerlines the law requires that the burden of proof shifts to the utility, as discussed further

below, to either contest the fact that vegetation made contact with the powerline igniting the fire or demonstrate that even though its equipment ignited the fire it nevertheless was acting prudently. (See e.g., D. 21-08-024, at 17-18) So the *Final Decision's* assertion that Del Monte did not cite to the appropriate evidence, is inappropriate and demonstrates failure to conduct the proceeding in a manner required by law.

It is also relevant to point out that any deficiency in Del Monte's evidence can be attributed to the unfairness of denying Del Monte the ability to conduct discovery on the issue of PG&E's culpability in causing the Tubbs Fire by making it out of scope while arguing that Del Monte's evidence's conclusions reasonably drawn from the available evidence are insufficient to shift back to PG&E the burden of proof that was never lawfully on Del Monte in the first place.

**E. The *Final Decision* Improperly Shifts the Burden of Proof to Del Monte and Applies a "Certainty" or "Near Certainty" Standard of Proof to Del Monte to Shift the Burden back to PG&E.**

To remind the Commission, applicants bear the burden of proof in ratesetting proceedings to demonstrate by the preponderance of evidence that it is just and reasonable for the applicant to recover the requested rates. A preponderance of the evidence is often defined “in terms of probability of truth, e.g., ‘such evidence, when weighed with that opposed to it, has more convincing force and the greater probability of truth’.” (D. 12-12-030 at 42, *aff'd* D. 15-07-044 at 28-30). Further, when the applicant lacks evidence supporting material facts necessary for a ruling in its favor and an opposing party did submit evidence into the evidentiary record that competently speaks to material facts, the preponderance of evidence standard requires taking the facts presented by the opposing party as true because the Commission has no evidence to weigh it against. The contested evidence that was brought into the record by to use of Official Notice cannot be relied upon to stop or satisfy the shifting burden to the utility. As such, if the record does not contain competent evidence that competently speaks to the truth of a material fact on which the Commission a determination is required to meet the required standard of review, the applicant has failed to meet the required burden of proof and the inadequately supported request must be denied.

In this proceeding, PG&E had the opportunity to contest, but chose to not provide competent evidence in satisfy its burden on the issues Del Monte raised. Therefore, by definition, the preponderance of evidence necessarily weighs in Del Monte's favor because there is no competent evidence that the Commission can weight it against. Assertions that it is not convinced are irrelevant to the requirement of law that it is PG&E's burden to demonstrate the rates that it requests are just and reasonable. When confronted with competent evidence that it

would be unjust and unreasonable, PG&E must provide competent evidence that outweighs it or its request to recover fails. Thus, there is no reasonable basis for the Commission to find that the Tubbs Fire CEMA costs are reasonable and incremental to prudent management. Therefore, the Commission must deny recovery of 100% the requested Tubbs Fire CEMA costs.

**F. The Commission's Treatment of CAL FIRE and SED Tubbs Fire Reports Compared to Del Monte's Evidence Violates Rule 13.6**

Rule 13.6 requires that evidence be treaded in such a manner that "the rights of parties to meaningfully participate in the proceeding and to public policy protections shall be preserved." The manner in which the Commission treats the CAL FIRE and SED Tubbs Fire Reports as immutable evidence to establish a material fact as settled and to provide evidence that outweighs Del Monte's competently presented also violates the Commission's Rule 13.6 because it created circumstances that made it impossible for Del Monte to meaningfully participate in the proceeding or protect the public from unjust and unreasonable rates.

**G. The Commission's Approval of Settlement Does not Meet the Requirements of Rule 12.1(d)**

As recognized by ALJ Nojan in the Proposed Decision (mailed on October 11, 2022 (See Proposed Decision at pgs. 10-16) and Commissioner Darcie L. Houck dissenting to the *Final Decision*, approval of the Settlement Agreement violates Commission Rule 12.1(d). Rule 12.1(d) states that the Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest. Proponents of a settlement agreement have the burden of demonstrating that the proposed settlement meets the requirements of Rule 12.1 and should be approved by the Commission. (See D.12-10-019 at pgs. 14-15; D.09-11-008 at pg. 6)

Parties to the Settlement Agreement ("Settling Parties") do not specify cost reductions associated with each of the memorandum accounts but merely agree on a total revenue requirement. (See Joint Summary Table, filed September 22, 2021 in response to ALJ Ruling). Although the parties represented distinct interests, the Settlement Agreement fails to clarify the extent to which disputed costs are reasonable. The Settlement Agreement lacks a discussion of which activities will account for the corresponding reduction(s). The Settling Parties state in the Motion for Adoption of the Settlement Agreement that the Settlement Agreement "is the product of concessions and trade-offs among the Settling Parties." Those not party to the settlement ("Objecting Parties") raise concerns about is an arbitrary final number following an opaque process of reductions to the accounts.



For example, Wild Tree characterized the Settlement Agreement as “allow[ing] PG&E to collect a completely random amount for which the Proposed Settling Parties have provided no evidence or argument[.]” (Wild Tree Comments on Settlement Agreement at pg. 4) Del Monte contends that the Settling Parties and the Settlement Agreement proposed Settlement fails to “adequately represent all issues relevant to the public interest” including the issue of whether PG&E imprudently caused the Tubbs Fire and the resulting Tubbs Fire CEMA costs. (Del Monte Comments on the Settlement Agreement at pg.10) TURN argues that “the total revenue forgone by PG&E under the settlement is insufficient, given the strength of the record as developed thus far in support of far higher disallowances.” (See TURN Comments on Settlement, at 2-3)

The Settling Parties argued that “a settlement is not unreasonable merely because it does not fully adopt a party’s position, as the Objecting Parties appear to suggest.” (Joint Parties Reply Comments on Settlement Agreement) This point is true, but irrelevant. A settlement is not unreasonable because it does not adopt a party’s position, but is unreasonable if it does not address the issues material to the public interest raised by non-settling parties. Settlements brought to the Commission for review are not simply the resolution of private disputes, such as those that may be taken to a civil court. The public interest and interests of ratepayers must also be taken into account, and the Commission’s duty is to protect those interests. (D.90-08-068 pg. 10, citing D.90-08-068 at pg. 360.) It is the Commission’s responsibility to assess and protect the public interest independently. (D.01-02-075 at pg. 10) In approving a settlement the Commission is to “consider individual elements of the settlement in order to determine whether the settlement generally balances the various interests at stake as well as to assure that each element is consistent with [] policy objectives and the law.” (D.01-02-075 at pg. 10, citing D.96-01-011, 64 CPUC2d, 241, 267, citing D.94-04-088.) The *Final Decision* fails to protect the public interest from Tubbs Fire CEMA costs because it ratifies the Assigned Commission's choice to bar from consideration competent evidence that PG&E imprudently caused the Tubbs Fire which is both material to the public interest and to compliance with statutory law.

Further, the Settlement Agreement’s lack of granularity on how to apply reductions denies the Commission the ability to competently assess whether the Settlement Agreement is reasonable in light of the whole record. This is problematic not only to the Objecting Parties, but also because it denies the Commission the ability to conduct a review compliant with Rule 12.1(d). The Commission’s duty to scrutinize each individual element of a settlement with additional vigilance becomes paramount in proceedings, such as here, where the utilities submit “mega-applications” that cover numerous discrete events under numerous theories of law and

involve billion-dollar figures. The size of the application does not diminish the Commission's duty to carefully apply the law to each element relevant to the case.

The Settling Parties offer several reasons why the Commission should adopt the Settlement Agreement. The Settling Parties argue that the Settlement Agreement is 1) reasonable in light of the whole record and 2) “reflects a reasonable balance of the various interests affected in this proceeding in light of the whole record.” (See *Joint Motion for Approval of Settlement Agreement* at pg. 11) Both assertions are false.

The Settlement Agreement does not reflect a reasonable balance of the various interests; it is not an all-party settlement. Rather, the Settlement is opposed by Del Monte, TURN, and the Wild Tree Foundation. It is clear from the positions taken by the Settling Parties that no settling party considered whether PG&E caused the Further, as it was pointed out that they have a substantial record on which to base a decision without the need to approve the Settlement Agreement. Therefore, it is impossible to find that the Settlement Agreement adequately balances the various interests affected by this proceeding or that the Settling Parties meet the burden of demonstrating the Settlement is reasonable under this criterion.

The Settling Parties argue that the Settlement Agreement is in the public interest because the “proposed 81% recovery substantially reduces that burden” and “the proposed settlement also resolves disputed issues... without further litigation, which conserves the Commission’s and Settling Parties’ time and resources, which in turn benefits customers.” (Joint Motion for Approval of Settlement Agreement at pg. 11) Because all aspects of this proceeding, other than the filing of reply briefs, had occurred prior to the filing of the proposed settlement for approval, very little conservation of resources occurred as a result of the Settlement Agreement.

Finally, Section 5.10 of the Settlement Agreement states: "*No Personal Liability*: None of the Settling Parties, or their respective employees, attorneys, or any other individual representative or agent, assumes any personal liability as a result of the Settling Parties signing this Settlement Agreement." This provision conditions the validity of the Settlement Agreement on release of the liability for against those who presented for, among other things, defrauding the Commission and defrauding ratepayers. The public interest is not served by approving such a provision as it tends to corrupt the integrity of Commission proceedings and suggests that the decision approving it may have been procured by fraud.

## **H. Denying Del Monte's Ability to Participate on the Issue PG&E's Causation of Tubbs Fire Violated Del Monte's Due Process Rights under the California Constitution**

Under the California Constitution, “A person may not be deprived of life, liberty, or property without due process of law.” (Cal. Const., art. I, § 7, subd. (a)) A fundamental requirement of due process is “the opportunity to be heard.” (*Grannis v. Ordean* (1914) 234 U.S. 385, 394) “It is an opportunity which must be granted at a meaningful time and in a meaningful manner.” (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552) In a California administrative context, a party's due process rights “must be determined in the context of the individual's due process liberty interest in freedom from arbitrary adjudicative procedures.” (*Ryan v. California Interscholastic Fed'n-San Diego Section* (2001) (“*Ryan*”) 94 Cal. Appg. 4th 1048, 1069; see also, *People v. Ramirez* (“*Ramirez*”) (Cal. 1979), 599 P.2d 622, 627) Order of California railroad commission fixing gas rates after hearing wherein commission refused to consider any evidence of reproduction cost was unconstitutional as denying gas company due process.

By excluding PG&E's culpability in causing the Tubbs Fire from the proceeding in which PG&E seeks to recover Tubbs Fire CEMA costs, the Commission denies Del Monte the ability to participate in this proceeding in a meaningful way or be heard in a meaningful way on the key material fact of contention necessary the lawful consideration of the recoverability of PG&E's Tubbs Fire CEMA costs. (See for e.g., [U.S. Constitution] *Pacific Gas & Electric Co. v. Railroad Commission of California* (N.D.Cal.1936), 13 F.Supp. 931, still valid on the point that Commission's refusal to appropriately consider evidence on a material issue violates due process despite the District Court being overruled in 58 S.Ct. 334 on a finding that due process was not implicated because the Commission was able to use another valid valuation method that is not dependent on consideration of reproduction costs.) Further, the scoping decision denied Del Monte the ability to conduct discovery on the issue of PG&E's culpability for causing the Tubbs Fire then shifts the burden of proof to Del Monte and challenges the sufficiency of Del Monte's evidence.

The manner in which the Commission conducted this proceeding not only deprived Del Monte and the public from the protections of Section 451 requiring that they only be suffered to pay only just and reasonable rates, it also deprives the Del Monte of the statutory benefits of intervenor compensation because the Commission has demonstrated that it will deny Del Monte any intervenor compensation related to participation on matters connected to PG&E's culpability for causing the Tubbs Fire. (See e.g. D.22-01-006 Icomp Decision denying 80% of requested award due to relation to work on PG&E culpability for Tubbs Fire.)

V. CONCLUSION

For the above reasons, the Commission should vacate its approval of the Settlement Agreement and deny with prejudice PG&E Tubbs Fire CEMA costs.

Respectfully Submitted,

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